STATE OF MICHIGAN

IN THE SUPREME COURT

TOMO PERKOVIC,

Plaintiff-Appellee,

v

AARON WILLIAM BROWN,

Defendant-Appellant.

Supreme Court No. 123171
Circuit Court No. 2000-4399-NI
Court of Appeals No. 235699

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123171
Appl response

PLAINTIFF'S SUPPLEMENTAL BRIEF IN RESPONSE TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

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A. The Record Evidence is Not Merely Speculation

In Defendant's Reply to Plaintiff's Response to Defendant's Application for Leave to Appeal, Defendant argues that Plaintiff is relying on 'speculation' to assert that Defendant passed through the intersection on a red light. This is not speculative, it is a reasonable inference. The bottom line is that Plaintiff did not see the light red, but he did see it yellow, and waited a time before he turned, enough time for him to conclude it had turned red. Defendant asserts that, even though not in evidence, there was testimony from Defendant that he saw the light green some distance before passing through the intersection. Either way, neither party saw the light as they passed under it. They each have a different version of why they think the light was a certain color as they drove into the intersection, and as such, why they believe they had the right-of-way.

Plaintiff's version is the only one in evidence (and it is detailed in Plaintiff's Response to Defendant's Application for Leave to Appeal, as well as being attached thereto). In his Reply Brief, pp. 3-4, Defendant argues that Plaintiff

> admittedly relies on the assumption that every 'yellow light turns red eventually' (emphasis added. Although Plaintiff's assumption is not always valid (some yellow lights never turn red), even if we assume that it is valid here, it does not follow that the light was red when the instant collision took place.

(Defendant's Reply to Plaintiff's Response to Defendant's Application for Leave to Appeal, pp. 3-4). While perhaps it is true that some yellow lights do not turn red, in evidence is the fact that this intersection of 19 Mile Rd. and Saal Rd. had a through lane, left turn lane and right turn lane and suspended traffic lights. (Plaintiff's Deposition Transcript, pp. 21-22).

At this type of intersection, where Defendant apparently claimed the light was green when he saw it, the yellow light would turn red. In other words, if Defendant claims he saw it green, and Plaintiff saw it yellow, it would not go between green and yellow only, it would turn to red.

These inferences to be made from the testimony are not speculative, they are real evidence, when heard by the fact-finder. The cases cited by Defendant in his Application for Leave to Appeal (p.11) are readily distinguishable. For instance, in Hall v Consolidated Rail Corp, 462 Mich 179, 187; 612 N.W.2d 112 (2000), the Court decided the evidence was factually too speculative. In that matter, a motorist was killed by a train and sued the owner and operator of the train. A witness testified that there had been prior malfunctions of the warning signals, and the Court held that was insufficient to determine that the railroad had notice of a defect in the signals. The Court held that notice could not simply be deduced from prior defects; however, here, there is eyewitness testimony of the yellow light. It is easy to deduce that a yellow light changes to red. Clearer testimony from both Plaintiff and Defendant as to how far away they were or how long they waited for the lights is necessary. However, Plaintiff's testimony that he waited what he considered long enough that the light would be red, is a reasonable inference based upon firsthand knowledge, not a "maybe" as in Hall.

Similarly, Hampton v Waste Management, 236 Mich App 598; 601 NW 2d 172 (1999), as well as Cloverleaf Car Co v Phillips Petroleum Co, 213 Mich App 186, 192-193; 540 NW 2d 297 (1995), present cases of a total lack of evidence of notice and causation. It was a matter of the conditions existing and arguments that since these

conditions existed, the Defendants must have caused and had notice of them. The case at bar presents an entirely different set of facts and evidence.

The Court is supposed to take the evidence in the light most favorable to the nonmoving party, the Plaintiff. Maiden v Rozwood, 461 Mich 109, 120; 597 NW2d 817, 822 (1999). Assuming that the Defendant's version of the collision, especially without record evidence, is correct, is not viewing the evidence in a light most favorable to the nonmoving party. This Court should not allow the trial court to do so. This is not what a summary disposition motion is meant to be. When there are disputed questions of material fact, the case must pass to a fact finder to make a determination based upon all of the evidence.

Defendant argues that there is no credibility determination to be made. However, hearing the evidence, each party's version of the event, firsthand to determine which party is telling a more plausible and believable version, is necessary to the determination of this case.

Respectfully Submitted,

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Dated: August 26, 2003

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PROOF OF MAILING

On August 28, 2003, by U.S. Mail, I sent a copy of Plaintiff's Supplemental Brief in Response to Defendant's Application for Leave to Appeal and Proof of Mailing to:

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I declare that the above statements are true to the best of my information, knowledge and belief.

Patricia Fritz